UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DANIEL BOCK, JR., Plaintiff, *vs.* PRESSLER AND PRESSLER, LLP, Defendant.	Case No.: 2:11-cv-07593-KM-SCM

RESPONDING BRIEF ON BEHALF OF
PLAINTIFF, DANIEL BOCK, JR.,
ESTABLISHING ARTICLE III STANDING

[ORAL ARGUMENT REQUESTED]

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ARGUMENT

The argument in Pressler's Brief [D.E. 85], having ignored the Third Circuit's published post-*Spokeo* decision, is fatally flawed and should be rejected.

A. Summary of the Argument

The Parties do not dispute what *Spokeo* held.

Bock's Brief [D.E. 86] discussed his tangible and intangible harms. Despite such harms being already in the record, Pressler's arguments rest on a baseless contention that Bock somehow admitted to having no injury-in-fact. Hence, Pressler failed to apply *Spokeo*'s analysis of concrete harm—both tangible and intangible—or even consider the Third Circuit's *Nickelodeon* decision.

B. Pressler Failed to Address the Nickelodeon Decision.

Under a section heading entitled "Post-*Spokeo* Cases" [D.E. 85 at p. 9], Pressler discussed two Court of Appeals opinions, but ignored *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262 (3d Cir. 2016). Yet, the Mandate signaled *Nickelodeon* as the case in which the Third Circuit "recently discussed *Spokeo*'s impact on Article III standing." [D.E. 74-2 at p. 5].

The Mandate's supporting Opinion explained:

> [In *Nickelodeon*] we interpreted *Spokeo* to say that "even certain kinds of 'intangible' harms can be 'concrete' for purposes of Article III . . . . What a plaintiff cannot do . . . is treat a 'bare procedural violation . . . [that] may result in no harm' as an Article III injury-in-fact." *Id.* at *7 (quoting *Spokeo*, 136 S. Ct. at 1550). We observed that "in some cases an injury-in-fact may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Nickelodeon*, 2016 WL 3513782 at *6. Specifically, we addressed the Supreme Court's deference to Congress, noting that "*Spokeo* directs us to consider

> whether an alleged injury-in-fact 'has traditionally been regarded as providing a basis for lawsuit,'" and "Congress's judgment on such matters is . . . 'instructive and important.'" *Id.* at *7 (quoting *Spokeo*, 136 S. Ct. at 1549). [.. [that] may result in no harm' as an Article III injury-in-fact." *Id.* at 273–74 (quoting *Spokeo*, 136 S.Ct. at 1550).

Id. Bock's Brief addressed both the 'traditionally-regarded' and 'Congress-judgment' considerations as discussed in *Spokeo* and understood by *Nickelodeon*. Pressler, however, elided either consideration.

C. Pressler Failed to Address Bock's Tangible Harm.

The record establishes Bock's tangible harm. *See*, D.E. 34-3 (Declaration), 86 (Brief), and 86-2 (Declaration). Pressler avoided discussing tangible harm by its erroneous contention that "Bock judicially admitted that he sustained no actual damage." D.E. 85 at p. 8. Such admission supposedly flowed from the Court-approved Stipulation [D.E. 64] where the Parties agreed to fix Bock's monetary damages at $1,000.00, the maximum allowable under the FDCPA. *See*, 15 U.S.C. § 1692k(a)(2)(A).

The Stipulation was made in response to the Court's Opinion granting Bock's Summary Judgment Motion [D.E. 34]. That Motion only sought adjudication of Pressler's liability. After granting the Motion, the Opinion's penultimate sentence stated, "The parties shall, if they wish, submit letter briefs not to exceed ten pages as to the appropriate measure of damages." D.E. 59.

Rather than litigate "the appropriate measure of damages," the Parties entered into the Stipulation. Neither that Stipulation nor the limitation in Bock's Complaint to "additional damages" meant that he suffered no tangible harm or actual damages. Indeed, the extent of actual harm is a relevant factor as to the amount of additional damages.

When awarding "additional damages," a court "shall consider" certain factors "among other relevant factors." 15 U.S.C. § 1692k(b). The harm inflicted as well as its absence have been considered relevant when awarding additional damages. *See, e.g., McHugh v. Check Investors, Inc.*, 2003 WL 21283288 (W.D.Va. May 21, 2003) (harm enhanced additional damage award); and, *Kaschak v. Raritan Valley Collection Agency*, 1989 WL 255498, *10 (D.N.J. May 23, 1989) (additional damages not higher because the violations were not "conducive of actual harm.")

Thus, Bock's additional damages were based, in part, on his tangible injuries which were re-affirmed by the Stipulation for the maximum additional damages.

D. Pressler Failed to Address Bock's Intangible Harm.

Pressler argued, "As a consequence [of Bock's admission of no actual damage], this Court need not analyze whether Bock has pled the existence of an intangible injury." D.E. 85 at p. 4 (internal quotation marks omitted). Pressler conflated actual damage with intangible harm when the two are distinct. Having done so, Pressler skipped discussing the concreteness of Bock's intangible harm. Thus, it offered none of the analysis *Spokeo* anticipated including the risk of harm and the 'traditionally-regarded' and 'Congress-judgment' considerations adhering to Congress's judgment.

E. Pressler's FDCPA Violations Are Neither "Technical" nor Procedural.

Underlying Pressler's argument is another unsupportable position: an FDCPA claim without an allegation of actual damages "stem[s] solely from a technical or procedural violation of the FDCPA." D.E. 85 at p. 3. Pressler's words evoke *Spokeo*'s admonition: "a bare procedural violation, divorced from any concrete harm" is not an injury-in-fact. *Spokeo*, at 1549. But as explained in Bock's Brief, his case is one with concrete harm—both tangible *and* intangible. Pressler's attempt to equate a suit limited to additional damages with "a bare procedural violation" lacks logical force and also lacks support in recent case law.

Even if there were no "actual damages," the overwhelming majority of the post-*Spokeo* decisions conclude that the FDCPA creates rights, the violation of which constitutes an injury-in-fact. "In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Spokeo*, 1549 (emphasis in original). Those decisions are cited in Bock's Brief [D.E. 86].

We have found an additional decision issued after Bock submitted his Brief. In *Hayes v. Convergent Healthcare Recoveries, Inc.*, 2016 WL 5867818 (C.D. Ill. Oct. 7, 2016), Hayes alleged that Convergent's settlement letter did not disclose the debt was time-barred. Convergent raised standing. The court concluded that "a violation of the right under [15 U.S.C. §] 1692e to be free from false or misleading representations from debt collectors creates a harm, or risk of harm, sufficient to meet the requirement of concreteness." *Id.* at *4. Bock held the same right under 1692e, which Pressler wrongfully invaded. Like Hayes, Bock too has standing.

The fact is this case is a poor vehicle for the debt collection industry in general, and Pressler in particular, to seek to extend *Spokeo* into a sweeping declaration that would gut the FDCPA and its established scheme of private enforcement through statutory damages[1]. This Court found from the undisputed evidence that Pressler misrepresented its attorney involvement. D.E. 59 at pp. 22-25. The underlying state court complaint deceptively concealed the fact there was—and the important details surrounding—a second assignment before Pressler's client (Midland) claimed ownership of Bock's alleged debt. The undisputed record establishes Bock paid both a filing fee and an attorney to defend the Pressler collection suit, then paid Pressler $3,000.00 to settle it. *See*, Brief [D.E. 86] at p. 11 of 14 (citing to record). Irrespective of the Parties' substantive positions, this is concrete harm under any formulation. Thus, unless it chooses to, this Court need not wade into the more nuanced issue of whether a collector's violation of the Act's anti-deception provisions alone provides standing when unaccompanied by any evidence of actual damages or a stipulation to award maximal additional damages.

CONCLUSION

For the foregoing reasons and those in the Brief [D.E. 86], Plaintiff, Daniel Bock, Jr. respectfully requests the Court to determine he has standing and enter final judgment consistent with the Court's prior judgment [D.E. 67].

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[1] Recalling that a collection lawyer trade group and a consortium of state creditors bar associations filed an *amicus* brief in support of Pressler as appellant. Brief for Nat'l Ass'n of Retail Collection Attorneys, et al. as Amici Curiae Supporting Appellant, *Bock v. Pressler & Pressler*, No. 15-1056 (3d Cir. June 12, 2015). Bock also notes that the Consumer Financial Protection Bureau and the Federal Trade Commission filed a joint *amicus* brief. Brief for Consumer Fin. Prot. Bureau, et. al. as Amici Curiae Supporting Appellee, *Bock*, *supra* (3d Cir. Aug. 13, 2015). The agencies later filed with the Court of Appeals a letter brief "urg[ing] the Court to conclude that Bock has suffered a concrete harm sufficient to establish Article III standing." Electronic Amicus/Intervenor Supplemental Letter Brief at 1, *Bock*, *supra* (3d Cir. June 3, 2016) (copy appended).

Respectfully submitted,

Dated: October 17, 2016

s/Philip D. Stern
Philip D. Stern

Dated: October 17, 2016

s/Andrew T. Thomasson
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